

## Brigham Young University Law School BYU Law Digital Commons

---

### Utah Supreme Court Briefs

---

2011

# Utah Down Syndrome Foundation v. Utah Down Syndrome Association : Reply Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Lynn O. Poulson; Johnson, Poulson and Coons; E. Barney Gesas; Andersen and Karrenberg; Attorneys for Judgment Debtor and Appellant Donald D. Gilbert, Jr..  
Russell A. Cline; Crippen and Cline; Attorney for Plaintiff and Appellee Utah Down Syndrome Foundation, Inc..

---

### Recommended Citation

Reply Brief, *Utah Down Syndrome Foundation v. Utah Down Syndrome Association*, No. 20110205.00 (Utah Supreme Court, 2011).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/3096](https://digitalcommons.law.byu.edu/byu_sc2/3096)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

**IN THE UTAH SUPREME COURT**

---

UTAH DOWN SYNDROME  
FOUNDATION, INC.,

Plaintiff/Appellee,

vs.

UTAH DOWN SYNDROME  
ASSOCIATION, et al.,

Defendants/Appellants.

---

THE MEMBERS OF THE UPTOWN  
DOWNS AND UP WITH DOWN, the Salt  
Lake and Utah County Chapters of the  
Utah Down Syndrome Foundation,

Intervener.

---

Third District Court No. 070902087

Appellate Case No. 20110205-SC

---

**REPLY BRIEF OF APPELLANT**

---

Russell A. Cline (4298)  
Crippen & Cline  
10 West 100 South, Suite 425  
Salt Lake City, Utah 84101  
Telephone: 801 539-1900  
Attorneys for Plaintiff and Appellee  
Utah Down Syndrome Foundation, Inc.

Lynn O. Poulson (9734)  
Johnson, Poulson & Coons,  
a Professional Corporation  
1435 East 2000 North  
Lehi, Utah 84043  
Telephone: 801 766-4000  
Facsimile: 801 766-0101

E. Barney Gesas, *of Counsel* (1179)  
Andersen & Karrenberg  
50 West Broadway, Suite 700  
Salt Lake City, Utah 84101-2035  
Telephone: 801 534-1700  
Facsimile: 801 364-7697  
Attorneys for Judgment Debtor and  
Appellant Donald D. Gilbert, Jr.

---

**IN THE UTAH SUPREME COURT**

---

UTAH DOWN SYNDROME  
FOUNDATION, INC.,

Plaintiff/Appellee,

vs.

UTAH DOWN SYNDROME  
ASSOCIATION, et al.,

Defendants/Appellants.

---

THE MEMBERS OF THE UPTOWN  
DOWNS AND UP WITH DOWN, the Salt  
Lake and Utah County Chapters of the  
Utah Down Syndrome Foundation,

Intervener.

---

Third District Court No. 070902087

Appellate Case No. 20110205-SC

---

**REPLY BRIEF OF APPELLANT**

---

Russell A. Cline (4298)  
Crippen & Cline  
10 West 100 South, Suite 425  
Salt Lake City, Utah 84101  
Telephone: 801 539-1900  
Attorneys for Plaintiff and Appellee  
Utah Down Syndrome Foundation, Inc.

Lynn O. Poulson (9734)  
Johnson, Poulson & Coons,  
a Professional Corporation  
1435 East 2000 North  
Lehi, Utah 84043  
Telephone: 801 766-4000  
Facsimile: 801 766-0101

E. Barney Gesas, *of Counsel* (1179)  
Andersen & Karrenberg  
50 West Broadway, Suite 700  
Salt Lake City, Utah 84101-2035  
Telephone: 801 534-1700  
Facsimile: 801 364-7697  
Attorneys for Judgment Debtor and  
Appellant Donald D. Gilbert, Jr.

---

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iv
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	3
I. UDSF HAS IMPROPERLY MISSTATED THE APPELLATE RECORD FACTS REGARDING D. GILBERT'S NON-PARTY STATUS AND HIS LEGAL REPRESENTATION ACTIONS OF HIS CLIENT'S BEFORE THE TRIAL COURT TO TACTICALLY CREATE AN INCORRECT RECORD IN THIS APPEAL TO DEFEAT D. GILBERT'S LEGAL ARGUMENTS THE APPEALED ORDERS ARE VOID FOR LACK OF <i>IN PERSONAM</i> JURISDICTION.....	3
A. Gilbert's Appeal of the Trial Courts' Orders of Disgorgement of Funds is Premised on the Doctrine of Lack of <i>In Personam</i> Jurisdiction Rendering the Appealed Orders Void for Failure to Serve D. Gilbert with Rule 4, U. R. Civ. P. Process .....	3
B. UDSF Opening Brief's Misstating the Appeal Record Facts to Create an Incorrect Record Concerning D. Gilbert's Non-Party Status Before the Trial Court.....	5
C. Rebuttal Statement of Facts Regarding D. Gilbert's Non-Party Status	6
II. USDF's CHALLENGES TO D. GILBERT'S LEGAL AUTHORITIES SUPPORTING HIS CLAIMS THE DISTRICT COURT'S APPEALED ORDERS ARE INVALID BASED ON LACK OF <i>IN PERSONAM</i> JURISDICTION AND DENIAL OF DUE PROCESS ARE WITHOUT MERIT .....	8
A. USDF's Challenge to and Distinguishing of D. Gilbert's Opening Brief's Legal Authorities and Arguments Concerning the Doctrine of <i>in Personam</i> Jurisdiction are Based on USDF's Erroneous Assumption and Mischaracterization of the Non-Party Status of D. Gilbert Before the District Court.....	8

<b>B.</b>	<b>UDSF's Claim D. Gilbert's Appearance as Counsel of Record for Certain Individuals and UDSF Affiliated Chapters Before the District Court and His Failure to Object to the District Court's <i>in Personam</i> Jurisdiction Resulted in D. Gilbert's Waiving His Individual Rights to Personal Jurisdiction is Misplaced and Ignores the Trial Court's Procedural Irregularities.....</b>	<b>10</b>
<b>C.</b>	<b>The Facts Involving the Submission and Entry of the District Court's May 2007 Disgorgement Order Against D. Gilbert and the Ensuing March 10, 2008 District Court Hearing Document D. Gilbert Was Denied Due Process .....</b>	<b>12</b>
	<b>CONCLUSION .....</b>	<b>15</b>
	<b>CERTIFICATE OF MAILING .....</b>	<b>17</b>

## **TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b><u>Cases</u></b>	
<u>Barlow v. Cappel</u> , 821 P.2d 465 (1991).....	9
<u>Carlson v. Bos</u> , 740 P.2d 1269 (Utah 1987) .....	9
<u>Jackson Constr. Co. Inc. v. Marrs</u> , 2004 UT 89, 100 P.3d 1211 (Utah 2004).....	9
<u>Murdock v. Banke</u> , 484 P.2d 164 (Utah 1971) .....	9
<u>Robinson &amp; Wells, P.C. v. Warren</u> , 669 P.2d 944 (Utah 1984) .....	9
<b><u>Rules</u></b>	
Utah Rules of Appellate Procedure Rule 24 .....	1
Utah Rules of Civil Procedure Rule 4.....	3
Utah Rules of Civil Procedure Rule 7(f)(2) .....	13
Utah Rules of Civil Procedure Rule 17.....	5
Rule 4 Article 3-Utah Supreme Court’s Standards of Professionalism Rule 14-301 .....	1

The Appellant Donald D. Gilbert, Jr. ("**D. Gilbert**") submits this Reply Brief in accordance with Utah R. App. Proc. 24.

### **PRELIMINARY STATEMENT**

The Appellee Utah Down Syndrome Foundation, Inc. ("**UDSF**") Opening Brief ("**UDSF's Brief**") filed in opposition to D. Gilbert's Opening Brief ("**Gilbert's Brief**") is based on three factual content and procedural structural sections that improperly constitute attempts to create an erroneous procedural and factual presentation of D. Gilbert's party status in this appeal and before the Trial Court below. These three material Utah Appellate Court Rules non-compliant briefing departures are procedurally incorrect, are not factually supported by the record and include legal arguments and authorities that are not applicable to the issues raised on appeal and blatantly disregard the undisputed facts.<sup>1</sup>

The first serious UDSF's Brief departure from the Utah Supreme Court's mandated and fundamental briefing requirements is UDSF's repeated attempts to mischaracterize and mislead D. Gilbert's party status in the Trial Court proceedings by repeated attempts to infer and clearly make D. Gilbert a party as defined under Utah Rules of Civil Procedure Rule 17 throughout the Trial Court proceedings. It is undisputed D. Gilbert was never a party in the Trial Court proceedings and the Appellate record to be referenced later in this Reply Brief fully supports D. Gilbert's non-party status.

---

<sup>1</sup> Rule 4 **Article 3-Utah Supreme Court's Standards of Professionalism** Rule 14-301. Standards of Professionalism and Civility provides "Lawyers shall never knowingly contribute . . . or seek to create such an unjustified inference or otherwise seek to create a 'record' that has not occurred."

The second UDSF opposition briefing departure is the submission of a tactical and studied factual statements catalogue creating unjustified, mischaracterized and misstatements throughout the UDSF Brief to make an untruthful record regarding D. Gilbert's non-party status, confuse and misstate D. Gilbert's procedural actions and arguments presented to the Trial Court. This UDSF briefing approach of creating a misleading record in its brief presented to this Court has been engaged to create improper factual statements and erroneous inferences to be drawn therefrom that D. Gilbert was at all material times a party in the Trial Court proceedings. UDSF has submitted undocumented facts to this Court to make it appear D. Gilbert appeared in the Trial Court at the relevant times to this appeal not only as a party but D. Gilbert made legal arguments for and in his own behalf rather than as legal counsel for individual clients and certain UDSF affiliated chapters to the UDSF. These particular UDSF briefing tactics and record manipulation is improper, not true and are not sanctioned appellate practice.

The third UDSF improper briefing departure is its challenge to D. Gilbert's Brief legal arguments and authorities by unfairly distinguishing D. Gilbert's legal authorities based on UDSF's unfounded assumptions and claims D. Gilbert was at all times a party in this case. UDSF mischaracterizes D. Gilbert's non-party status continuously to bottom its frontal assault on D. Gilbert's factual record, legal arguments and citations in an effort to undermine D. Gilbert's well founded factual and legal points presented in the Gilbert Brief.

D. Gilbert's assertion of the foregoing three serious UDSF briefing non-compliant departures from the Utah Rules of Appellate Procedure present and inserted throughout



several sections of UDSF's Brief will be presented and documented in the following argument sections of this Reply Brief.

## ARGUMENT

### POINT I

**UDSF HAS IMPROPERLY MISSTATED THE APPELLATE RECORD FACTS REGARDING D. GILBERT'S NON-PARTY STATUS AND HIS LEGAL REPRESENTATION ACTIONS OF HIS CLIENT'S BEFORE THE TRIAL COURT TO TACTICALLY CREATE AN INCORRECT RECORD IN THIS APPEAL TO DEFEAT D. GILBERT'S LEGAL ARGUMENTS THE APPEALED ORDERS ARE VOID FOR LACK OF *IN PERSONAM* JURISDICTION.**

**A. D. Gilbert's Appeal of the Trial Courts' Orders of Disgorgement of Funds is Premised on the Doctrine of Lack of *In Personam* Jurisdiction Rendering the Appealed Orders Void for Failure to Serve D. Gilbert with Rule 4, U. R. Civ. Procedure.**

It is undisputed that D. Gilbert is a licensed Utah attorney. (R. 280-281). At various times during the prosecution of the case by UDSF in the Trial Court, D. Gilbert represented certain individuals and UDSF affiliated charitable entities as their legal counsel. (R. 1336, p.2) Further undisputed from the outset of this case to the filing of this appeal D. Gilbert has never been served a summons and complaint in this case required by Rule 4 of the Utah Rules of Civil Procedure.

Gilbert's primary grounds for his appeal to this Court are he was never a party at any time to this case and never served with process. As a consequence by operation of both controlling Utah case law and constitutional law, the appealed June 13, 2008 and January 14, 2011 District Courts' Orders entered against D. Gilbert directing the disgorgement of certain funds paid to Gilbert as attorney fees by his former selected individual and two UDSF affiliated chapters clients while this case was pending before

the Trial Court. D. Gilbert does not dispute that the District Court had entered an order on May 3, 2007 directing that certain UDSF bank accounts be protected and that certain defendants in the case were precluded from issuing checks against the accounts. (R. 1336, p. 6). Mr. Gilbert represented to the District Court during a March 10, 2008 hearing he was confused by the terms of the March, 2007 Order. (R. 1336, pp. 6-7). Also, D. Gilbert was never provided an opportunity to present to the Trial Court as a party, not as a lawyer representing certain individuals and entities, his factual and legal defenses that ultimately formed the basis for the disgorgement orders entered against him and now on appeal before this Court. (R. 1336, pp. 2-95). In responding to D. Gilbert's appeal here, UDSF has done everything it can to create confusion, disregard the Trial Court record and truth as D. Gilbert's non-party status at all relevant times before the District Court.

Critical to D. Gilbert's appeal is a fair and proper understanding of his non-party status before the Trial Court. This status is central to the review and consideration of D. Gilbert's lack of *in personam* jurisdiction appealed attack on the validity of the appealed orders. Inexplicably UDSF has taken the path of distorting the facts in its opening brief in an attempt to prevent D. Gilbert from presenting his valid appellate arguments to this Court.

In an improper and unfair attempt to derail D. Gilbert's valid *in personam* jurisdiction arguments raised on appeal here. UDSF has either misstated the critical facts as to the procedural history and the non-party status of D. Gilbert in its opening brief or

in the alternative made half-truths in its brief in a plain effort to defeat D. Gilbert's *in personam* jurisdictional arguments raised on appeal.

**B. UDSF Opening Briefs' Misstating the Appeal Record Facts to Create an Incorrect Record Concerning D. Gilbert's Non-Party Status Before the Trial Court.**

D. Gilbert will present here examples of UDSF Opening Briefs' serial and/or attempts to mischaracterize and mislead D. Gilbert's non-party status in the Trial Court proceedings. Doing so appears to be a studied effort to clearly make it appear D. Gilbert was a party defendant under Utah Rules of Civil Procedure Rule 17 at all material times relating to the Trial Court issuing two orders. The first order is a May 3, 2007 partial summary judgment and injunctive relief default order entered against certain individual defendants in the proceedings before the District Court. (R. 51-54) It is undisputed that as of and prior to May 3, 2007, D. Gilbert was neither counsel of record for any parties in the case before the District Court and was not an individual party defendant. (R. 55). The second order which is appealed to this Court is the June 13, 2008 order (R. 1078-1081) that was a default order entering a judgment for disgorgement of funds against D. Gilbert. Again, at the time of the entry of this order, D. Gilbert was not a party defendant to the proceedings before the District Court in which the order and judgment was entered against D. Gilbert. (*Id.*)

The following rebuttal "statement of facts" set forth in UDSF's Brief that D. Gilbert asserts are examples of incorrect, misleading or unsupported factual statements made by UDSF to establish a basis for improper inferences and make an inaccurate

record as to Mr. Gilbert's non-party status are set forth in this following section of D. Gilbert's Brief.

**C. Rebuttal Statement of Facts Regarding D. Gilbert's Non-Party Status.**

**No. 1 UDSF Brief Misstatement of Appeal Record Facts.**

On December 21, 2007, UDSF filed a Motion for Disgorgement of Funds against Donald Gilbert. (R. 849-850.) On February 1, 2008, Gilbert filed an opposing memorandum. (R. 872-877.) On March 18, 2008, Gilbert appeared at a hearing and defended against that motion (R. 1336.)

*Id.* at 2.

**D. Gilbert's Response to UDSF Brief's No. 1 Factual Misstatements.**

**"... Gilbert filed an opposing memorandum."**

*Id.* at 2.

This UDSF factual statement is misleading because the memorandum was filed in behalf of the Intervenor, not D. Gilbert. (R. 872-877).

**UDSF Brief's assertion "... Gilbert appeared at a hearing and defended against that motion"**

This UDSF factual statement is misleading because D. Gilbert only argued in behalf of his clients. D. Gilbert did not defend against the claims for himself and the District Court would not accept any defense arguments from D. Gilbert for his clients or otherwise. (R. 1336, p. 87, lines 15-17).

**No. 2 UDSF Brief Misstatement of Appeal Record Facts.**

**On January 5, 2007, Donald D. Gilbert filed an action in behalf of Utah Down Syndrome Foundation, Uptown Downs, Up with Downs, Eric L. Holman and Melanie Taylor against Suzie Smith and other officers of UDSF, titled *UDSF et al. vs. Suzie Smith, et al.*, Civil No. 070900363 (the "First Action") seeking declaratory relief that Suzie Smith and other officers of UDSF did not have authority to act on behalf of UDSF.**

*Id.* at 4, ¶ 12.

#### **D. Gilbert's Response to UDSF Brief's No. 2 Factual Misstatements.**

This UDSF factual statement is unsupported and misrepresents material facts. The action was actually a petition to the District Court to require UDSF to hold an annual meeting and vote for a Board of Directors. **(R. 214 [Affidavit of Eric L. Holman ¶ 2.] )**

To further illustrate UDSF Brief's factual misstatements set forth in p. 4, paragraph 12, its Memorandum in Support of Motion for Entry of Summary Judgment and Order to Show Cause is telling. This UDSF memorandum was part of two motions that were heard at the same time and as part of the hearing on UDSF's Motion for Disgorgement of Funds (first motion). **(Paragraph 29) (R. 157).** This UDSF memorandum states: "On June 4, 2007, \$11,000.43, together with the Wells Fargo Account numbers of the 14 county Salt Lake chapters were sent to Don Gilbert FN2, . . ." **"FN2: On July 13, 2007, Mr. Gilbert made an appearance in this matter as the attorney filing a Motion to Intervene."**

UDSF's foregoing memorandum including its footnote No. 2 is contradictory to all UDSF Brief's repeated factual statements that D. Gilbert made a general appearance for himself or argued in his own behalf. *See* UDSF Brief, pp. 5-6: ¶¶ 21-25; p. 6; Summary of Argument, first paragraph, third sentence, p. 7; ¶ 1, pp. 2-3.

#### **No. 3 UDSF Brief Misstatement of Appeal Record Facts.**

**UDSF Brief's factual assertions in the second paragraph, again is misleading where the last sentence states:**

**The court questioned Mr. Gilbert as to how he could take money in violation of Court Order.**

*Id.* at 8.

#### **D. Gilbert's Response to UDSF Brief's No. 3 Factual Misstatements.**

In this particular UDSF Brief's factual statements takes improper factual statement liberties by citing the foregoing quote out of context. The District Court was not questioning D. Gilbert as to how he (then a non-party to the proceedings) could take payments of his attorney fees from funds subject to and in violation of court order. Instead it is clear the District Court Judge was asking D. Gilbert how his clients could legally or otherwise justify the alleged wrongdoing [drawing funds from accounts subject to a court ordered freeze]. *See* **(R. 1336, pp. 54-56).** The foregoing cited appellate record here clearly demonstrates the District Court was addressing the serious issues of how could D. Gilbert's individual clients would use these court ordered impounded funds to pay D. Gilbert his attorney fees.

UDSF Brief then proceeds to quote the March 10, 2008 oral argument hearing transcript (R. 1336 at p. 56):

**And if you knew the funds were coming from the bank account that was a court order, I can't say you were blameless.**

In resorting to and making the foregoing quote, USDF, once again, improperly takes out of context and excludes the previous critical sentence ["crops"] of the District Court's relevant statement that under the circumstances was required to be included in USDF's Brief to be candid to this Court and ethically fair to D. Gilbert. The USDF critically and unfairly omitted District Court statement is:

**So the fact that your clients attempted to pay you with money that's subject (unintelligible) a court order is their fault, not yours.**

(R. 1336, p. 56, lines 10-13).

## POINT II

**UDSF's CHALLENGES TO D. GILBERT'S LEGAL AUTHORITIES SUPPORTING HIS CLAIMS THE DISTRICT COURT'S APPEALED ORDERS ARE INVALID BASED ON LACK OF *IN PERSONAM* JURISDICTION AND DENIAL OF DUE PROCESS ARE WITHOUT MERIT.**

**A. USDF's Challenge to and Distinguishing of D. Gilbert's Opening Brief's Legal Authorities and Arguments Concerning the Doctrine of *in Personam* Jurisdiction are Based on USDF's Erroneous Assumption and Mischaracterization of the Non-Party Status of D. Gilbert Before the District Court.**

UDSF attacks D. Gilbert's legal authorities and arguments cited in support of his claim that the District Court's orders were invalid for lack of *in personam* jurisdiction to support D. Gilbert's appeal on this issue must fail and its contra legal authorities are of no credible weight. USDF attempts to convert D. Gilbert into a party to the Trial Court proceedings to support its attack on both his legal authorities cited in support of his lack of *in personam* jurisdiction. See Argument Point I, *supra*. USDF argues D. Gilbert's cited legal authorities all involved *in personam* jurisdiction issues where the **defendants**

in each cited case had “no actual notice of the proceedings against them and never appeared in the case.” See UDSF’s Brief at p. 7.

UDSF cites Jackson Constr. Co. Inc. v. Marrs, 2004 UT 89; 100 P.3d 1211 (Utah 2004); Carlson v. Bos, 740 P.2d 1269 (Utah 1987); and Murdock v. Banke, 484 P.2d 164 (Utah 1971). UDSF’s reliance on these cases to challenge D. Gilbert’s *in personam* jurisdiction argument is misplaced. In Jackson, Carlson and Murdock, the parties raising the failure of *in personam* jurisdiction argument they had no actual notice of the proceedings initiated against them involved parties who were defendants in each of these cases cited by UDSF. Again UDSF glaringly ignores the undisputed appellate record facts that D. Gilbert was not a party to the proceedings before the Trial Court at any time when the Orders of Disgorgement were entered against him.

Similarly, UDSF asserts D. Gilbert’s Brief fails to cite any legal authority concerning the defense of *in personam* jurisdiction where an individual has made an appearance in a judicial proceeding, defended themselves and was thereafter unsuccessful in claiming the court lacked *in personam* jurisdiction. *Id.* at pp. 8-9. UDSF cites In Robinson & Wells, P.C. v. Warren, 669 P.2d 944 (Utah 1984) and Barlow v. Capps, 821 P.2d 465 (Utah App. 1991). Robinson and Barlow both involved parties in the Trial Court proceedings that were raising the lack of personal jurisdiction defense. Again UDSF’s authorities challenging D. Gilbert’s *in personam* jurisdiction defense disregard D. Gilbert’s non-party status. Accordingly the Court should give little weight, if any, to UDSF’s authorities challenging D. Gilbert’s lack of *in personam* jurisdictional argument raised in this appeal.



UDSF's Brief's challenges to D. Gilbert's Brief's *in personam* legal authorities are again premised on the erroneous assumption that D. Gilbert was a party to the proceedings before the District Court. It is clear from the appellate record that D. Gilbert was never a party to the litigation proceedings pending before the Trial Court at the time the appealed June 13, 2008 Order and Judgment of Disgorgement of Funds and the January 14, 2011 Minute Entry Order were entered. Upon an objective and fair review of the appellate record, UDSF's attacks on and attempts to distinguish D. Gilbert's supporting legal authorities regarding the doctrine of *in personam* jurisdiction by disingenuously morphing D. Gilbert into a party in the Trial Court proceeding renders the appealed orders void fails. Furthermore, it casts a pale over the credibility of UDSF's Brief.

**B. UDSF's Claim D. Gilbert's Appearance as Counsel of Record for Certain Individuals and UDSF Affiliated Chapters Before the District Court and His Failure to Object to the District Court's *In Personam* Jurisdiction Resulted in D. Gilbert's Waiving His Individual Rights to Personal Jurisdiction is Misplaced and Ignores the Trial Court's Procedural Irregularities.**

UDSF contends D. Gilbert appeared in the District Court proceedings in his own behalf to defend himself and thereby voluntarily appeared and submitted himself to the District Court's *in personam* jurisdiction. UDSF further contends D. Gilbert's appearance before and making arguments to the District Court precludes him from raising on appeal any challenge to the District Court's lack of *in personam* jurisdiction over him; and further precludes D. Gilbert from challenging the validity of the appealed District Court orders. See UDSF's Brief at pp. 8-9.



UDSF's argument D. Gilbert submitted himself to *in personam* jurisdiction of the District Court is without merit. D. Gilbert did not appear before the District Court on his own behalf on March 10, 2008. (R. 1336, p. 2). His appearance was a lawyer representing certain individuals and UDSF Chapter affiliates. (*Id.*) This argument, once again, is based on UDSF's carefully studied effort to mischaracterize in its Opening Brief's Statement of Facts and legal arguments untrue procedural facts concerning D. Gilbert's individual status before the Trial Court. UDSF has repeatedly attempted to argue and assert factually that D. Gilbert appeared before the District Court as a Utah Rules of Civil Procedure Rule 17 party. D. Gilbert was never such a party. This mischaracterization of D. Gilbert's status before the District Court as it relates to his *in personam* jurisdiction issues raised on this appeal is factually incorrect. There is no appellate record support to show that D. Gilbert appeared before the District Court at any time as a party to the Trial Court proceedings. It is undisputed his only role was that of legal counsel representing certain individuals and selected UDSF affiliated Chapters at all relevant times involved in this appeal. (R. 1187).

UDSF has also ignored various irregular Trial Court procedural events raised in D. Gilbert's Opening Brief that fully support D. Gilbert was denied due process which should invalidate the appealed orders. UDSF has built a false foundation and premise throughout its reply brief not only that D. Gilbert was a party before the Trial Court but he was also provided procedural due process. (*See* UDSF Brief at pp. 10-11). UDSF has also glossed over and ignored the Trial Court's irregularities that included transferring the case back and forth between judges at critical times; and the lower court's allowing

UDSF's counsel to submit orders entered against D. Gilbert that were not in conformance with the District Court's rulings against D. Gilbert or did not conform to the Trial Court's actual rulings. Moreover, D. Gilbert was never given an opportunity to object to the entry of the appealed orders against him before the Trial Court. UDSF has ignored these various irregular Trial Court proceedings and procedural events raised in D. Gilbert's Opening Brief that fully support D. Gilbert was denied due process which should invalidate the appealed orders.

**C. The Facts Involving the Submission and Entry of the District Court's May 2007 Disgorgement Order Against D. Gilbert and the Ensuing March 10, 2008 District Court Hearing Document D. Gilbert Was Denied Due Process**

Contrary to UDSF Brief's protestations that D. Gilbert was fully afforded due process before the Trial Court concerning the appealed orders entered against him (UDSF Brief at pp. 10-11), the undisputed following facts prove otherwise. The appealed orders should be vacated and reversed based on the blatant violation of D. Gilbert's most fundamental due process rights. (*See* Gilbert Opening Brief at pp. 18-22 and authorities cited).

On December 21, 2007, UDSF filed a motion for disgorgement of \$22,500 against D. Gilbert in the District Court for attorney fees paid to him by his individual client and UDSF affiliated chapters. (R. 849-50). UDSF asserted the source of the fees paid to D. Gilbert were subject to the "freeze order" of May 3, 2007 entered in this case. On March 10, 2008, the District Court conducted a hearing on this motion as well as another UDSF motion. (R. 1336, pp. 2-95). D. Gilbert appeared at the hearing to represent his individual clients and certain UDSF affiliated chapters. He did not appear in his own

behalf or represent himself in this hearing. *Id.* (R. 1336, p. 2).

At the March 10, 2008, hearing the Court ordered a disgorgement of \$22,500 D. Gilbert had been paid by the USDF Chapter Boards for legal services previously rendered. (R. 1336, pg. 79, lines 1-4). The funds had been paid from the USDF affiliated Chapter accounts that Judge Faust mistakenly believed were frozen from any and all chapter board members or officers being able to issue checks from the chapter accounts. (R. 1336, pg.77, lines10-24). It appears from the record, his mistake arose from his misreading parts of Judge Maughan's May 3, 2007 Order at paragraph 2a. The words "or on deposit in" the accounts were slipped into the proposed May 3<sup>rd</sup> Order prepared by USDF's counsel and submitted to Judge Maughan, who summarily signed the order. (R. 1336, pg. 16, lines 14-19). This caused the relief granted by the May 3<sup>rd</sup> Order to be different than and greater in scope and severity to the relief requested in the USDF Motion seeking the order contained in USDF's Motion for Partial Summary Judgment and Injunctive Relief (R. 45-47). Paragraph 2(a) of the May 3<sup>rd</sup> Order prepared by USDF's counsel and submitted to the Court for signature contains the words "Return all funds taken from or on deposit in Zion's Bank... and First American Credit Union." (R. 51-54). Significantly, the words "or on deposit in " do not appear in the Motion (R. 45-47). This particular phrase "or on deposit in" comes only from the submitted and signed May 3<sup>rd</sup> Order and was never reviewed or approved as required by Utah Rules of Civil Procedure Rule 7(f)(2). procedure. (R. 51-54).

Thus the District Court, either by mistake or in reliance on the misrepresentation of USDF's counsel, granted, by default, significant and prejudicial relief against D.

Gilbert which was not sought in the UDSF motion. Further, it should be noted that by adding the particular phrase UDSF's counsel made the May 3, 2007 Default Order contradict itself. As paragraph 2(a) reads the individual Defendants are to return all funds on deposit in the accounts, but paragraph 2(h) of the same Default Order purports to restrain the same Defendants from accessing those accounts, which access would be necessary for defendants to return the funds on deposit. (R. 51-54).

The District Court stated in the March 10, 2008 hearing that the Court could only deal with the UDSF, "this non-profit corporation" and "the individual defendants." (R. 1336, pg. 94, lines 15-18). The Court went on to further clarify, "So my orders and my dealings have to be limited to corporation, the individual defendants. Correct?" (R. 1336, pg. 95, lines 1-3).

On March 11, 2008, the Court issued a Minute Entry granting judgment against the Defendants. (R. 907-910). In its Minute Entry the Court stated, "Any remaining issues reserved regarding the disgorgement of funds is also granted in Plaintiff's favor." (R. 908). The mailing certificate attached to the Minute Entry certifies that it was sent to "Donald D. Gilbert, Attorney for Defendants." (R. 910). It was not sent to a party that was not a defendant, D. Gilbert, but to the Attorney for Defendants.

The foregoing occurred in March 2008. D. Gilbert withdrew as counsel for all his clients from the case on April 14, 2008 and was no longer connected to the case in any way. (R. 920-921). UDSF's counsel immediately filed a Notice to Appear in Person or Appoint counsel (R. 922-924) thereby acknowledging that D. Gilbert had been the attorney (not a party) for several parties.

Additionally, new counsel for various parties entered appearances and made several motions, of which, D. Gilbert had no actual knowledge at the time, no notice, and no opportunity to respond (R. 969-1186). However, on June 13, 2008, the Court signed an "Order and Judgment (Donald Gilbert)" in the amount of \$32,453.00 (R. 1078-1081), but did not take UDSF's Second Motion For Disgorgement of Funds under advisement until October 8, 2008; and in a Minute Entry the Court refers to D. Gilbert as "Defendant Donald Gilbert" (R. 1127) (never served on D. Gilbert). The District Court's actions were done with D. Gilbert never having received service of process or an opportunity to defend himself. The Order and Judgment grants relief significantly different than the disgorgement claims discussed in the March 10, 2008 hearing. (R. 1079). It is not clear from the appellate record why an Order and Judgment against non-party D. Gilbert was signed on June 13, 2008 but not considered until October 8, 2008; or why the District Court would consider D. Gilbert to be a defendant, where the court's entire file is void of any evidence D. Gilbert was a party to the case. (R. 1-1336).

### CONCLUSION

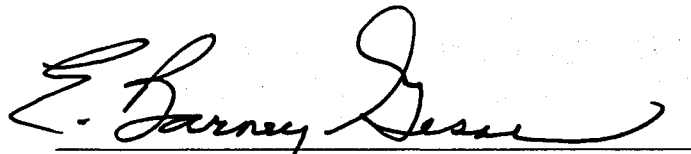
UDSF's Brief submitted in opposition to D. Gilbert's appeal to this Court has inappropriately and unfairly attempted to create an appellate record that mischaracterizes D. Gilbert as being a party to the District Court proceedings. UDSF's efforts to do so are without record support and unfortunately constitute improper acts to create before this Court a "record" that does not exist. From these improper efforts, UDSF has attempted to make unfounded legal arguments challenging D. Gilbert's appeal points that the

District Court lacked *in personam* jurisdiction over and denied him procedural due process rights that render the appealed June 2008 and January 2011 orders invalid.

It is respectfully submitted that UDSF's legal arguments and opposition to D. Gilbert's appeal should be rejected and D. Gilbert's appeal be granted. It is further respectfully submitted this Court should reverse the District Court's June 2008 and January 2011 Orders, vacate and set them aside and remand this case to the District Court for further proceedings to consider D. Gilbert's defenses to the two appealed orders on the merits.

DATED this 13<sup>th</sup> day of January 2012.

**RESPECTFULLY SUBMITTED,**



E. Barney Gesas, of Counsel  
Andersen & Karrenberg  
50 West Broadway, Suite 700  
Salt Lake City, Utah 84101-2035  
Telephone: 801 534-1700  
Facsimile: 801 364-7697

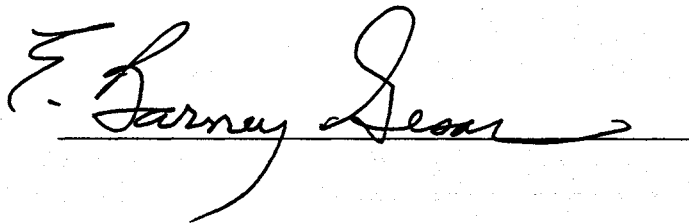
Lynn O. Poulson  
Johnson, Poulson & Coons,  
a Professional Corporation

**Attorneys for Judgment Debtor and  
Appellant Donald D. Gilbert, Jr.**

**CERTIFICATE OF MAILING**

I certify that two true and correct copies of the Reply Brief of Appellant were mailed on January 13<sup>th</sup>, 2012 by first-class mail, postage prepaid, to the following:

Russell A. Cline  
Crippen & Cline, L.C.  
10 West 100 South, Suite 425  
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to read "E. Darney Dean", is written over a horizontal line.